IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for mandates in the nature of Writs of Certiorari and Prohibition under and in terms of Article 140 of the Constitution.

Lanka Brush Exports (Private) Limited
No. 36, Industrial Zone, Modarawila, Panadura.

Petitioner

Case No. C. A. (Writ) Application 208/2017

Vs.

1. Commissioner General of Labour
   Department of Labour,
   Labour Secretariat, Kirula Road, Colombo 05.

2. L. M. Hewawithana
   Assistant Commissioner of Labour,
   District Labour Office – Panadura,
   No. 90, 07th Cross Street, Panadura.

3. M. S. K. Munagama
   Senior District Labour Officer,
   District Labour Office – Panadura,
   No. 90, 07th Cross Street, Panadura.

4. P. A. R. Patherana
   No. 32/1A, Station Road, Mount Lavinia.

5. Hon. Attorney General
   Attorney General's Department, Colombo 12.

Respondents

Before: Janak De Silva, J.

Counsel:

M. Adamally with Shahla Sharkar for the Petitioner

Milinda Gunethileke SDSG for the 1st to 3rd and 5thRespondents

D. Jayanetti with Iromie Jayarathna for the 4th Respondent

Argued on: 22.02.2019

Written Submissions tendered on:

Petitioner on 15.11.2018, 14.01.2019 and 28.06.2019

1st to 3rd and 5th Respondents on 15.11.2018

4th Respondent on 14.12.2018

Decided on: 20.05.2020

Janak De Silva J.

The 4th Respondent was the General Manager/Director of the Petitioner. He was employed by the Petitioner from 06th May 2006 to 31st July 2015. The 4th Respondent by letter 'P3' complained to the 2nd Respondent that the Petitioner had failed to pay Employees Provident Fund (EPF) and Employees Trust Fund (ETF) dues to the 4th Respondent for the period of employment of 9 years and 2 months. The 3rd Respondent by letter dated 19.08.2015 (P2) informed the Petitioner that an inquiry will be held into the said complaint. Both the Petitioner and 4thRespondent took part in the said inquiry.

By letter dated 27.08.2016 (R1/P8), the 2nd Respondent informed the Petitioner that after considering the material submitted by Petitioner at the said inquiry, it is established that there was an employer-employee relationship between the Petitioner and the 4th Respondent and as such the Petitioner is liable to pay the EPF in terms of the Employees Provident Fund Act No. 15 of 1958 as amended (Act).

The 2nd Respondent by notice dated 28.12.2016 (P9) informed the Petitioner of the computation. The 1st Respondent issued a final notice dated 02.02.2017 (P11) informing the Petitioner that legal action will be taken if payment of the overdue EPF is not made. Therefore, proceedings were instituted in the Magistrate's Court of Panadura Case No. 45213 to recover the moneys in default.

The Petitioner has sought the following relief –

a) A writ of certiorari quashing the purported determination of the 1st and/or 2nd and/or 3rd Respondents that the 4th Respondent was an "employee" of the Petitioner and/or that the Petitioner is liable to pay EPF and surcharge in respect of the 4th Respondent;

b) A writ of certiorari quashing the purported notices marked P8, P9 and P11 with the petition;

c) A writ of prohibition prohibiting the 1st and/or 2nd and/or 3rd and/or 4th Respondent from taking any steps towards prosecuting the Petitioner and/or otherwise in furtherance of the notices marked P8 and/or P9 and/or P11 with the petition.

The principal submission of the Petitioner is that the 1st to 3rd Respondents have misdirected themselves by addressing the questions of whether there was an employee-employer relation between parties when that was an admitted fact and the only issue to be decided was whether the amount paid to the 4th Respondent were paid in respect of his "employment" or whether it was paid as a "Director's Fee" in respect of his role as a Director of the Petitioner.

In spite of this stated position, at paragraph 25 of the petition, the Petitioner has sought a writ of certiorari to quash the determination that the 4th Respondent was an "employee" of the Petitioner. Accordingly, I will first consider whether there is any error in this conclusion.

There can be no doubt that a person can be both a director and an employee of a company at the same time.

In *Lee v. Lee's Air Farming Ltd* [(1960) 3 All ER 420 at 425}, Lord Morris of Borth-y-Gest held:

> "It is well established that the mere fact that someone is a director of a company is no impediment to his entering into a contract to serve the company … Nor in their Lordships' view were any contractual obligation invalidated by the circumstances that the deceased was sole governing director in whom was vested the full government and control of the respondent company."

This approach was applied in *Collette's Ltd v. Commissioner of Labour and Others* [(1986) 2 Sri.L.R. 6] where it was held that a Managing Director has a dual capacity of being an employee of the company and also at the same time takes part in the management of the company. It was further held that the fact that as Managing Director or as Group Managing Director, he takes part in the management of the affairs of the company does not deprive him of his other capacity as an employee of the said company. In that case, it was held that the 4th Respondent falls within the definition of a "workman" in the Act.

The Petitioner in this case concedes that the 4th Respondent functioned in a dual capacity as an employee and Director but contends that he was paid only for his role as a Director. According to the Petitioner, it is this issue that has not been addressed by P8/R1.

In letter dated 27.08.2016 (P8/R1), the 2nd Respondent states that the available material establishes that there was an employer-employee relationship between the Petitioner and 4th Respondent within the meaning of the Act. In terms of section 47 of the Act, "employee" includes any apprentice or learner who is paid a remuneration. Accordingly, the payment of a remuneration is an essential condition to the existence of an employer-employee relation within the meaning of the Act. When the 2nd Respondent held that there was an employer-employee relationship between the Petitioner and the 4th Respondent within the meaning of the Act, it necessarily means that consideration was given to the issue of whether the 4th Respondent was paid in respect of his "employment" and an affirmative finding made.

This conclusion is supported by evidence led at the inquiry. In terms of section 47 of the Act, "earnings" means inter alia wages, salary or fees. The contribution that must be made under the Act as EPF according to the section 10 of the Act is based on "earnings".

The pay slips of the Petitioner marked X14 and X15 and annexed to the written submissions of the 4th Respondent made before the Labour Department shows that the 4th Respondent was paid a salary. The salary slip X15 also shows that no EPF was paid by the Petitioner with regard to the 4th Respondent's salary. Documents annexed to the Petitioner's written submissions (P6) marked X16(a) to X16(e) made before the Labour Department show that the 4th Respondent was paid a salary by the Petitioner.

The true grievance of the Petitioner appears to be that there was an agreement between the 4th Respondent and the Petitioner that the 4th Respondent would not be paid EPF (X10 & P5). However, the Supreme Court in *Blanka Diamonds (Pvt) Ltd v. Van Els* [(2004) 3 Sri.L.R. 314] held that there can be no waiver of contribution by agreement between employer and employee as section 16(1) of the Act provides that "the employer of every employee to whom this Act applies shall, inrespect of each month during which such employee is employed by such employer, be liable to pay in respect of such employee, to the fund, on or before the last day of the succeeding month, a contribution of an amount equal to 3 per centum of the total earnings of such employee from his employment under such employer during that month".

The principle was followed by this Court in *Ceylon Agro Industries Limited v. Employees Trust Fund* [C.A. (PHC) 40/2003; C.A.M. 26.02.2016]. Therefore, I have no hesitation in rejecting the submissions of the Petitioner that the 4th Respondent is bound by the terms of the said agreement.

As an extension of this submission, the Petitioner contends that the 4th Respondent is seeking to *Quod approbo non reprobo* (approbate and reprobate) which should not be allowed. In support of this position, the Petitioner has cited the decision in *Ceylon Plywoods Corporation v. Samastha Lanka G.N.S.M.& Rajya Sanstha Sevaka Sangamaya* [(1992) 1 Sri.L.R. 157] where S. N. Silva, J. (as he was then) held that the doctrine of approbate and reprobate *(quod approbo non reprobo)* is based on the principle that no person can accept and reject the same instrument.

However, in this case, Court is confronted with an agreement between parties dealing with waiver of EPF benefit which is not valid according to the law. Hence, the principle of approbate and reprobate has no application to the instant case.

The Petitioner further submits that the claim of the 4thRespondent amounts to unjust enrichment in view of the contractual agreement between parties. In my view, this submission is erroneous in law as the 4th Respondent is claiming his statutory entitlements and in such the question of unjust enrichment is irrelevant.

The Petitioner further submits that the 1st and/or 2nd and/or 3rdRespondents have failed to provide reasons for the decision in P8. Reliance was placed on *Unique Gem Stones Ltd v. W. Karunadasa and Others* [(1996) 2 Sri.L.R. 357], *Kegalle Plantations Ltd v. Silva and Others* [(1996) 2 Sri.L.R. 180], *Karunadasa v. Unique Gem Stones Ltd and Others* [(1997) 1 Sri.L.R. 256] and *Kusumawathie and Others v. Aitken Spence & Co. Ltd. and Another* [(1996) 2 Sri.L.R. 18].

However, the Respondents point out these authorities did not lay down that there was a general principle that there is a right to reasons. While reserving my position on the need to give reasons, it is observed that the 1st – 3rd Respondents have in their objections given reasons for the decision contained in P8.

Finally, there is also the question of delay. P8 is dated 27.08.2016 while this application was filed on 20.06.2017 nearly 10 months after the decision.

In *Biso Menike v. Cyril De Alwis and Others* [(1982) 1 Sri.L.R. 368 at 379] it was held that an application for a Writ of Certiorari should be filed within a reasonable time from the date of the Order which the applicant seeks to have quashed. What is reasonable time and what will constitute undue delay will depend upon the facts of each particular case. However, the time lag that can be explained does not spell laches or delay. If the delay can be reasonably explained, the Court will not decline to interfere. The delay which a Court can excuse is one which is caused by the applicant pursuing a legal remedy and not a remedy which is extra-legal. One satisfactory way to explain the delay is for the petitioner to show that he has been seeking relief elsewhere in a manner provided by the Law.

In this case, the Petitioner did not resort to any legal remedies prior to the institution of this application. The first communication after the receipt of P8 is letter dated 05.01.2017 [P12(a)] by which a request was made for certified copies of the inquiry proceedings. The minute thereon marked P12(a) indicates that the Personal Manager Noel Fernando was informed that the request can be granted only upon a court order. This was conveyed to the Petitioner's lawyer. It is only after the Petitioner received summons to be present in the Magistrate's Court on 27.07.2019 was this application filed. I hold that there has been an undue delay in the circumstance of the case.

For all the foregoing reasons, this application is dismissed without costs.

Judge of the Court of Appeal